

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 08-13555-scc

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5 In the Matter of:

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7 LEHMAN BROTHERS HOLDINGS INC.,

8

9 Debtor.

10 - - - - - x

11 U.S. Bankruptcy Court

12 One Bowling Green

13 New York, NY 10004

14

15 June 9, 2016

16 2:01 PM

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23 B E F O R E :

24 HON SHELLY C. CHAPMAN

25 U.S. BANKRUPTCY JUDGE

1 Hearing re: Doc #52640 Debtors Motion to (A) Disallow and  
2 Expunge Certain RMBS Claims, and (B) Release Certain Related  
3 Claims Reserves/  
4

5 Hearing re: Discovery Conference (Claim of JPMorgan)/  
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16 THOMAS H. FRENCH  
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18 ALSO PRESENT TELEPHONICALLY:  
19

20 PATRICK MOHAN  
21 CELINE BUEHL  
22 CINDY DELANO  
23  
24  
25

1 P R O C E E D I N G S

2 THE COURT: How's everyone?

3 MR. COSENZA: Good afternoon, Your Honor.

4 THE COURT: I'm just looking at the list. Got a  
5 couple folks on the phone, listen-only mode.

6 MR. COSENZA: Sure. Good afternoon, Your Honor,  
7 Todd Cosenza from Willkie, Farr & Gallagher, for Lehman  
8 Brothers Holdings, Inc., the plan administrator. Your  
9 Honor, we made a motion a little over six weeks ago to  
10 expunge a number of claims, and we thought the motion was  
11 basically a motion to seek administrative relief to clean up  
12 the claims registry, in light of prior orders that have been  
13 answered by the Court. So we ask for a simple order  
14 directing the expungement of the proofs of claims that were  
15 attached to Exhibit B to our motion, basically to clean up  
16 the claims registry.

17 The claims on Exhibit B previously were expunged  
18 by a fact of the protocol order, and the protocol extension  
19 order. The trustees have not submitted any loans due  
20 protocol for those claims. I don't think that's disputed in  
21 the motions. So after 16 months of operating under the  
22 protocol, the trustees now argue that the protocol -- and  
23 this, I'm trying to understand their argument -- that the  
24 protocol only applies to cover loans, not to all the RMBS  
25 trust, and the trustees basically seek to revise, in some

1 way revoke the prior orders from the Court on the protocol  
2 order, as well as the protocol extension order.

3 And Your Honor, I want to note, before I get into  
4 the details of the argument, there have been many direct  
5 representations made to Lehman, as well as to the Court, as  
6 to the protocol and how it was intended to be a full  
7 comprehensive process, and cover all the trust, and  
8 seemingly, the trustees have done a 180, they're taking a  
9 very different position in their motion, in particular for  
10 the transfer of trust, saying that they are now part of the  
11 covered loans, and in theory, aren't covered by the  
12 protocol. And that, I think, is very different from the  
13 past, and how they've been operating under the protocol, and  
14 various statements that have been made to us, as well as to  
15 the Court. So Your Honor, for background, I don't know if  
16 can approach, and I have some slides, to go through the  
17 various definitions.

18 THE COURT: I have read everything, and as you  
19 know, I was there, so to speak, at the beginning when the  
20 estimation motion was heard, and the cross-motion, and then  
21 the protocol evolved. So, but that being said, I think it  
22 is useful for you to go ahead and take us through the  
23 definitions and the structure.

24 MR. COSENZA: Sure. So Your Honor, as you know,  
25 because in 2014, the trustees moved to increase the reserve,

1 and thus started a series of motions that led to a hearing  
2 that took place in the middle of December 2014. The  
3 trustees moved to increase the reserve. They also moved  
4 theoretically to allow and estimate claims. Lehman cross-  
5 moved for imposition under protocol. Any one of the primary  
6 reasons why we cross-moved for protocol was to try to get  
7 full and comprehensive, I would say belief would be too  
8 strong a word, but basically a full and comprehensive review  
9 of all the loans that could potentially be at issue.

10 So we included in our cross-motion various  
11 definitions of the RMBS claims, and in the slides that I  
12 handed to you, I just quoted a couple of the paragraphs from  
13 our complaint. Paragraph 1 talks about the claims that were  
14 brought, and how they totaled approximately \$37 billion  
15 against LBHI and SASCO for damages allegedly inured by their  
16 trust that issued Presidential mortgage-backed securities.  
17 This in intended to cover -- not just to cover loans, but  
18 all the loans. And indeed Your Honor, to go to Paragraph  
19 21, the RMBS protocol, among other things, includes a  
20 requirement that the RMBS trustees deliver to the plan  
21 administrator any and all loan files that the RMBS trustee  
22 believe may be put back to Lehman under the governing  
23 agreements.

24 So that was part of our motion that was before the  
25 Court back in December of 2014. We had our hearing. One of

1 the issues that was discussed was what the RMBS claims were  
2 intended to cover. We concluded that it should be a  
3 comprehensive program, and we are very fortunate that Your  
4 Honor, you agreed with our view, that we should go forward  
5 with the protocol, that would be a comprehensive way of  
6 resolving all of these claims. And in fact, Your Honor, if  
7 you look at the protocol itself, at Page 2, Note 1, the  
8 capitalized terms not defined herein shall have the same  
9 meaning ascribed to them as in the cross-motion, which was  
10 Lehman's cross-motion.

11 So the protocol order itself adopts the  
12 definitions that Lehman had put forward in its cross-motion  
13 for the imposition of the protocol. So the definition of  
14 the RMBS claims in the protocol correlates to what Lehman  
15 believes was at issue as part of our cross-motion to  
16 protocol, not the initial motion to estimate that the -- and  
17 the motion to increase the reserves that the trustees had  
18 put forward. So that's the background. One other thing,  
19 and the protocol -- an issue that came up in the briefing --  
20 at Page 4 of the Protocol, Section 3(e)(1), there's a  
21 statement that each RMBS trustee may submit to the plan  
22 administrator claims for alleged breaches of representations  
23 of warranties and document deficiencies. That was for all  
24 the RMBS claims.

25 And then there's a statement there, as described



1 below, and the trustees have argued that the definition of  
2 RMBS claims is what was described below, and how the things  
3 were going to be put to Lehman. This is clearly intended to  
4 cover the RMBS claims definition that had been built earlier  
5 and referenced in the protocol order, and in the cross-  
6 motion. As described below was basically just a process of  
7 how the claim files were supposed to be put to us, not to  
8 say that the RMBS claims were defined as by what's set forth  
9 below. If you look at the actual protocol, was next set  
10 forth below was how the process was supposed to work in  
11 terms of the claim files.

12 So Your Honor, that's all helpful background.  
13 There's now been, over time, a process for 16 months, where  
14 the RMBS trustees were going back, collecting files, putting  
15 them through the protocol. There are various stages through  
16 this process, where we try to meet various deadlines. One  
17 issue that came up a couple times was whether the RMBS  
18 trustees were meeting their deadlines, and whether or not  
19 they were intending to pursue loans under "transfer of  
20 trust." And there was representations made to both Lehman  
21 and to the Court that the RMBS trustees were not pursuing  
22 those claims.

23 And we moved along to the March 31st deadline,  
24 which was the deadline set forth in the protocol, and the  
25 RMBS trustees reached out to us a few weeks before the March

1 31st deadline, noting that there were several delineated  
2 loan files that they had trouble collecting, and asked for a  
3 two-month extension to get those loan files and put them  
4 through the protocol. Lehman had discussions with the RMBS  
5 trustees, and we brought this--they had made a motion to the  
6 Court seeking a two-month extension. We agreed to that  
7 extension, and if you look at the extension motion that was  
8 put forward -- and this is something that was filed by the  
9 RMBS trustees -- they requested an extension of the March  
10 31st overall claim file cutoff date to May 31st, solely in  
11 respect to the remaining covered loans, which was as defined  
12 in their motion, the 3800 additional loans that they needed  
13 an extension for to put through the protocol, and they  
14 attached those loans to Exhibit A of their motion.

15 Following that, Your Honor, they also mentioned in  
16 their motion that they will not submit any additional RMBS  
17 claims for covered loans or otherwise. That's to be clear,  
18 that was supposed to cover covered loans, and whatever else  
19 they believed to have been covered. Any other loans  
20 potentially could have been through the protocol. Under the  
21 protocol, other than the RMBS claims that they basically got  
22 an extension for --

23 THE COURT: But isn't is circular? Because if  
24 you're taking the position that the transferor claims were  
25 not covered by the protocol, then I'm imagining that they're

1 going to argue that there would be no need to reference  
2 them, because they're not covered by the protocol. So it's  
3 a little circular.

4 MR. COSENZA: But Your Honor, the point that was  
5 in this motion, I think as part of an additional component  
6 of the protocol, the addition of adding "or otherwise" was  
7 to ensure that it was not only just loans that they could  
8 have put under covered loans, but also any other loans that  
9 they theoretically could have put in?

10 THE COURT: Well, the term covered loans has its  
11 genesis in the estimation motion, correct?

12 MR. COSENZA: Yes. That is correct. And our  
13 definition of the RMBS claims has its origin --

14 THE COURT: In the cross-motion.

15 MR. COSENZA: In the cross-motion. And then Your  
16 Honor, also part of the extension motion, and the order that  
17 Your Honor entered --

18 THE COURT: But covered -- just in terms of your  
19 numbers, just give me a minute to find it again. I think  
20 there there's a big difference between all loans, and the  
21 covered loans.

22 MR. COSENZA: Oh yeah, there is, Your Honor.

23 THE COURT: I saw the number, but now I can't find  
24 it. It's in a footnote somewhere. Well, in any event, it  
25 doesn't matter -- if somebody knows the answer -- it's in

1 one of the early papers.

2 MR. COSENZA: Yes, it's in our, I think, I  
3 believe, I know it's definitely in our initial cross-motion  
4 to the protocol.

5 THE COURT: That's what I'm thinking as well.

6 MR. COSENZA: But there is a big difference, Your  
7 Honor. There were hundreds of thousands of loans that were  
8 also part of the--that would be in addition to the 200-some-  
9 odd thousand that are the covered loans. But Your Honor,  
10 one other things that I wanted to note was that the protocol  
11 itself contemplated that if loans are not put through by  
12 March 31st, they would be expunged. And the protocol  
13 extension order gave the same effect to what was initially  
14 in the protocol basically saying, "except for the ones that  
15 we provided an extension for, any such RMBS claims shall be  
16 deemed waived and released by the RMBS trustees, and  
17 disallowed and expunged upon entry of the order granting  
18 motion. And that order was submitted by the RMBS trustees,  
19 and it was entered by the Court a little over six weeks ago.  
20 So I think, Your Honor --

21 THE COURT: So this issue didn't bubble up, so to  
22 speak, until there was a, I think it was the March 31st  
23 letter that said -- from the trustees saying, just to be  
24 clear, the transferor files are not covered?

25 MR. COSENZA: The issue had come up, Your Honor, I

1 think at the status conference prior to that motion being  
2 made, so that I have to go back--I think it was somewhere in  
3 January, there was a discussion about whether or not these  
4 loans should be put through the protocol. And there was a  
5 statement made by, I believe two of the counsel for the  
6 trustees that they would make a decision not to put the  
7 transfer loans through the protocol, and the theory --

8 THE COURT: Purely cost-benefit, right.

9 MR. COSENZA: Particular if it wasn't worth doing  
10 that, because there was low probability of having any  
11 liability against Lehman. Which, from our perspective,  
12 makes total sense that they made that decision. So Your  
13 Honor, that's the background for how we got here today.  
14 There are a number of -- two other issues that have been  
15 raised by the motion. One is, there have been no claims  
16 that have been put against SASCO, and as part of the initial  
17 allocation process for the \$5 billion reserve, \$250 million  
18 have been set aside for SASCO. We believe that since no  
19 claims have been put against SASCO --

20 THE COURT: Physically, where were the SASCO --  
21 are all the transferor files SASCO files?

22 MR. COSENZA: No.

23 THE COURT: The majority of them? And so when the  
24 protocol commenced, where were the SASCO files? Do we know?  
25 Someone has their hand raised in the back. Mr. Witnauer, do

1 you remember?

2 MR. TOP: I'm Mr. Top.

3 THE COURT: I'm sorry, I do that to you every  
4 time.

5 MR. TOP: It's okay. I suspect that the loan  
6 files are applicable transferor loans are probably in the  
7 possession of various servicers for each of the various  
8 trusts. So it's not like Lehman has a bucket of SASCO  
9 loans.

10 THE COURT: Yep, okay. That's helpful. Is that  
11 consistent with what Mr. French is saying?

12 MR. FRENCH: I apologize, I couldn't hear is  
13 answer because (indiscernible).

14 THE COURT: It's okay. The answer was that  
15 they're with various servicers.

16 MR. FRENCH: They're definitely with various  
17 servicers, but SASCO--

18 THE COURT: Mr. French, tell the court reporter  
19 what your name is.

20 MR. FRENCH: Tom French, Willke, Farr & Gallagher.  
21 SASCO served as the depositor for substantially, all of the  
22 securitization process, and is completely independent of who  
23 was servicing a given trust, and is also completely  
24 independent of whether we're talking about transferor loans  
25 or covered loans.

1 THE COURT: Okay, I'm following you.

2 MR. FRENCH: All of the loans, whether sold by  
3 transferors, or sold by LBHI, went through SASCO into the  
4 trust. There were, in some instances, duplicated reps, but  
5 it was simply part of the structure of the SPD depositor  
6 (indiscernible) with the SEC.

7 THE COURT: What I'm going at with this question,  
8 and I should have made it clear, was that one of the  
9 arguments is that if you look at Paragraph Roman 1 of the  
10 protocol, and it talks about receipt of claims form  
11 servicers, I believe the trustees are arguing that that  
12 demonstrates, in their view, that it's limited to covered  
13 loans. And I'm trying to make that foot, because I'm not  
14 reading that language the same way, to tie that -- first of  
15 all, this is simply the receipt of files for services. But  
16 just on that point, I'm trying to understand where the  
17 transferor files lived, and how, if at all, that's at odds  
18 or not included in the Roman 1 process. I'm not taking  
19 evidence here. I don't want anyone to take the position  
20 that I'm taking evidence. So if we get to the point where  
21 there's a disagreement about something, you'll let me know.  
22 So, but it's helpful.

23 MR. FRENCH: Okay. It's my understanding that all  
24 of the loans when filed, decided to (indiscernible)  
25 servicers.

1 THE COURT: With one servicer or another.

2 MR. FRENCH: Or another, correct. And since  
3 SASCO, to my understanding, did pull loan files physically,  
4 it wasn't a servicer, it was simply a conduit through which  
5 loans went on their way to securitization (indiscernible).

6 THE COURT: Okay, thank you.

7 MR. COSENZA: The other, (indiscernible) one issue  
8 is SASCO. One other issue I wanted to address was the idea  
9 of sampling, for low-level loans. I think the history  
10 behind the protocol was the reservation of rights for  
11 sampling after loans were basically put through the protocol  
12 -- I think there was a description, maybe of a mop up for  
13 certain loans. I don't think the intention of the parties  
14 as they were proceeding through the protocol, and  
15 particularly the protocol language was to not put in a large  
16 group of loans, and then argue that they reserve all rights,  
17 then sample the losses.

18 It was up to the trustees to make that first step  
19 of putting the loans -- to collect the loans and put them  
20 through Step 1, for us to then sort of evaluate them and  
21 then move on, not to take their word that there would be a  
22 certain number of files to have (indiscernible) level  
23 losses, then we'll engage in a sampling exercise for them.  
24 That wasn't the intention of the parties, that wasn't the  
25 intention of the calculations of how things were done. It's



1 simply, as I think it "reads", both sides reserve their  
2 rights on sampling and whether or not that would ever become  
3 useful down the road. It wasn't a path for someone, one of  
4 the parties not to do something, and then say, "Oh, we'll  
5 just sample that claims that we're not going to respond to  
6 at different stages of the protocol." That was the  
7 intention of the parties, and I think the intention of the  
8 protocol from the beginning. So we were a little bit, very  
9 surprised by that letter from the trustees, as well as the  
10 argument that they put forward in response to our motion.

11 THE COURT: Okay, thank you.

12 MR. COSENZA: With that Your Honor, any questions,  
13 I'd be happy to answer for you.

14 MR. TOP: Good afternoon, Your Honor.

15 THE COURT: Good afternoon.

16 MR. TOP: Frank Top, from Chapman & Cutler, for  
17 U.S. Bank National Association, as trustee for a number of  
18 these trusts that are subject to the motion. This motion  
19 comes in the context of seeking to expunge various claims.  
20 And so as we take a look at the relief that's being  
21 requested, what they're asking to do is have this Court  
22 preclude the trustees from offering any other, any evidence  
23 whatsoever with respect to a couple of groups of loans.  
24 That being the transferor loans, and also the group of  
25 12,000 loans that we wrote a letter about, that basically we

1 said we could not economically, viably do these on a loan-  
2 by-loan basis, because it would be way too expensive to do  
3 so. Now we're saying the fact that each loan --

4 THE COURT: But hold on, hold on, hold on.

5 MR. TOP: Sure, sure, sure.

6 THE COURT: The 12,000 that you said you couldn't  
7 do on an economic basis --

8 MR. TOP: Correct.

9 THE COURT: Those were the subject of a letter?  
10 I'm confused --

11 MR. TOP: Yes, so on March 31st, we sent a letter  
12 -- and I believe it was attached to their motion, Your  
13 Honor.

14 THE COURT: Hold on, let me get it.

15 MR. TOP: Sure.

16 THE COURT: I'm sorry, the March 31st letter is  
17 the --

18 MR. TOP: Is written by Mr. Witnauer.

19 THE COURT: The real one, not you.

20 MR. TOP: That's right, that's right.

21 THE COURT: And it's the listed loans, right?  
22 Now, are all of those loans transferor loans?

23 MR. TOP: No, all of those are covered loans, and  
24 they were covered loans, but the losses were such that it  
25 costs us a certain amount of money to review each particular

1 loan file, and then to process the data that we get from  
2 reviewing the loan file, and then submitting it to Lehman,  
3 and then there's obviously going to be costs after that.

4 And there was --

5 THE COURT: Okay, I need to clarify this, because  
6 I'm not thinking about it in the right way.

7 MR. TOP: Sure.

8 THE COURT: So there's a term, covered loans.

9 MR. TOP: Correct.

10 THE COURT: It comes from the estimation motion.  
11 That's where it was born. It's not in the protocol anywhere  
12 else.

13 MR. TOP: It was included -- it's in the protocol.

14 THE COURT: It's in the protocol.

15 MR. TOP: We did include it in the estimation  
16 motion. It has its genesis even prior to the estimation  
17 motion. We previewed -- before filing the estimation  
18 motion, we had discussions with Lehman about how the heck  
19 are we going to try to resolve these claims?

20 THE COURT: All right, so let's just take -- the  
21 listed loans are all covered loans?

22 MR. TOP: That's correct.

23 THE COURT: Okay. So the covered loans are  
24 clearly subject to the protocol.

25 MR. TOP: That is correct.

1 THE COURT: Okay. So with respect to those, your  
2 argument is very simply that you had the right to make a  
3 determination to not submit certain covered loans, and seek  
4 to do sampling on them.

5 MR. TOP: Right, I guess I would say it a little  
6 bit differently. I would say it that because of the losses  
7 on those particular loans, the cost of reviewing them on a  
8 loan-by-loan basis and submitting them through the protocol  
9 was probably cost-prohibitive, in our view, and such that  
10 while we weren't going to submit them through the protocol,  
11 we wanted to reserve our right to somehow quantify the  
12 damages with respect to those particular loans using an  
13 alternative method, whether that be sampling or something  
14 else.

15 THE COURT: But you see, that's different than  
16 what I thought until moments ago, which is I thought what  
17 you were saying was that the loans that you were objecting  
18 to the expungement of were all transferor loans, and not  
19 covered loans.

20 MR. TOP: That is true, too. So we have two  
21 buckets of loans we're objecting to.

22 THE COURT: Okay, but to the extent that the loans  
23 you are objecting to are covered loans, your argument, then,  
24 on the definitions and the protocol, your argument is not  
25 that it's not covered, that they're not subject to the

1 protocol, you're just saying that the reservation of rights  
2 means that you didn't have to submit them, because you  
3 determined that it's not economic, and that after the  
4 protocol otherwise runs, and we are at the stage of looking  
5 at those claims for allowance or disallowance, you would get  
6 to renew your motion to do sampling.

7 MR. TOP: Or some other alternative means of  
8 resolution, but that's right.

9 THE COURT: But that's just not what the protocol  
10 says or how it was intended to operate. The bid and ask  
11 leading to the protocol, one of the issues that we were  
12 dealing with was that not all the loans were covered. So  
13 specifically, what everyone negotiated around when I  
14 indicated that I was not going to go down the sampling road  
15 at that juncture, was that we were going to have this  
16 comprehensive process in order to winnow down the number of  
17 hits, if you will, and then at the end we would see where we  
18 were, and if at that point, once we had a smaller and more  
19 robust and more reliable sample, if it still made sense to  
20 do sampling in that context, we would revisit it.

21 But it was never -- there was never an opt-out. I  
22 mean, there was never an opt-out, or to take you up on the  
23 common sense point that it doesn't make economic sense to  
24 put them through the protocol, there wasn't a provision that  
25 said, upon the certification of the trustees hat it's non-

1 economic, et cetera, et cetera, they're going to do  
2 something else. It's just inconsistent with the structure,  
3 and the clear words of the protocol -- I believe entirely,  
4 and without question, with respect to everything that you  
5 concede is a covered loan. Because either under your  
6 formulation of what claims are subject to the protocol,  
7 these are claims that are subject to the protocol.

8 MR. TOP: That's correct. And Your Honor has  
9 identified our argument with respect to that, right? Our  
10 argument is that with respect to that group of loans, we did  
11 not put them through the protocol. We admit that. And our  
12 argument is, because of the reservation of rights language,  
13 we would like to have, and reserve the right to quantify  
14 those using an alternative method of determination, be that  
15 sampling or something else, at least reserve that right, and  
16 that's our argument, and you put your finger on it, and  
17 you're either going to agree with that argument or you're  
18 not going to agree with that argument.

19 THE COURT: Well, I think I don't agree with the  
20 argument, but also belt and suspenders I don't agree with  
21 the argument because of the extension order. Because that  
22 very clearly says there's going to be an extension on the  
23 deadlines for which you're being extended, and everything  
24 else gets expunged. So I think if there were any ambiguity  
25 whatsoever -- and right now I just talking about the covered

1 loans, right -- that it just doesn't stand up. And I  
2 appreciate that the trustees are -- that there's a cost  
3 element here. And I heard you loud and clear on that point  
4 when we went through the process of coming up with the  
5 protocol.

6 So I think with respect to the covered loans, my  
7 ruling is that the protocol did not provide for this kind of  
8 an opt-out, and had the reservation of rights kick in, so  
9 that without having going through the protocol, there would  
10 be an opportunity to seek to have those claims allowed by  
11 sampling or otherwise. And that, in combination with the  
12 language in the extension order, means that those claims are  
13 properly expunged. So now I think we need to pivot, which  
14 has become a very significant word, I guess, so lately. We  
15 need to turn to anything else -- loans that are not, in your  
16 terminology, covered loans, right?

17 MR. TOP: Right.

18 THE COURT: Okay. And there the argument's a  
19 little bit different, right?

20 MR. TOP: Little bit different. So taking a look  
21 at the protocol order itself --

22 THE COURT: Right.

23 MR. TOP: It of course has, it references RMBS  
24 claims, and there is a notation in there that says  
25 capitalized terms not defined herein have the meaning set

1     forth in the cross-motion. The problem is, there was a  
2     defined term, RMBS claims in the protocol itself. And  
3     that's down in Section 3 of the protocol. I'll give you the  
4     exact citation here. It's Section 3(e)(i) on Page 4. And  
5     so before we even -- and so this definition comes in the  
6     context of this RMBS claim protocol, and so just jumping  
7     back to the beginning of this claim protocol, we talk about  
8     gathering the claim files, and the protocol provides that we  
9     are to provide letters of direction to two master servicers  
10    on certain of the covered loans, and so we went out and  
11    gathered the loan files, with respect to all these covered  
12    loans. And secondly, Lehman was supposed to provide us some  
13    information from Aurora, there was like, 51,000 covered  
14    loans that were --

15           THE COURT: That's in Roman 2, right.

16           MR. TOP: That's in Roman 2, and the hard drive  
17    was to contain all of the images, electronic images Aurora  
18    had in its system for the covered loans. This is on Page 2.

19           THE COURT: Mm-hmm. Where does it say covered  
20    loans in Roman 2?

21           MR. TOP: It says It's Roman Numeral II,  
22    Subsection B, two little Is, 1, and 3.

23           THE COURT: Okay.

24           MR. TOP: Okay, and so there's two reference to  
25    covered loans there, and they were to provide us with



1 information with respect to covered loans. Third, the next  
2 reference to covered loans comes with respect to our  
3 completeness review. So when we get those loans back, we  
4 are to confirm in writing to the plan administrator that  
5 these loans files are sufficient for the RMBS trustees to  
6 review and assert claims, if any, arising from or relating  
7 to covered loans included within the Aurora loan files. And  
8 that is the totality -- and there's no reference in here,  
9 there's no specific reference to transferor loan, or  
10 anything like that, that's silent with respect to whether or  
11 not this is designed to cover transferor loans. So then  
12 when you get the definition of RMBS --

13 THE COURT: Right, but when you say when you get  
14 to the definition, right, and you say -- your argument is  
15 that the definition includes the words as described below,  
16 and that the subsequent paragraphs in Sub-Paragraph E,  
17 helped to define RMBS claims. And my problem is that that's  
18 just not the way this works. The paragraphs that follow set  
19 forth the manner of claim submission. So the way you want  
20 this definition to read, and you would win if it said that,  
21 is it said, "An RMBS claim is any claim submitted to the  
22 plan administrator by the trustees." But that's not what  
23 this says. This says that each RMBS trustee may submit to  
24 the plan administrator RMBS claims. So the process points  
25 don't help on the fact that that this --

1 MR. TOP: Well, I guess my point is that this  
2 paragraph is coming in the context of all these paragraphs  
3 proceeding it that just talk about covered loans. Right, so  
4 then when we say we're gathering these loans, we're going to  
5 review them for completeness, and do all these other  
6 activities relating to covered loans, then we're going to  
7 submit a claim. That submission of a claim comes in the  
8 context of reviewing and considering the completeness of  
9 loan files, and things like that, of covered loans.

10 THE COURT: But the only time -- this paragraph,  
11 then, where we're talking about claim submission, right? It  
12 doesn't say that each RMBS trustee may submit to the plan  
13 administrator claims for alleged breaches of representation,  
14 and warranties and document deficiencies with respect to the  
15 covered loans. It says breaches of representations and  
16 warranties, each an RMBS claim, and that it harkens back to  
17 the terminology in the cross-motion. And just as a matter  
18 of common sense, why would we have -- and I really do want  
19 to find that number.

20 MR. TOP: You mean, in terms of number of  
21 transferor loans?

22 THE COURT: YEAh.

23 MR. TOP: At the time that we put together the  
24 protocol, I believe there were 209,000 covered loans. There  
25 are at least two or three times the number of transferor

1 loans, so I think at the time, there might have been a half  
2 a million, maybe a little bit more, maybe a little bit less?  
3 But it was a significantly larger number of loans that were  
4 in the pool of transferor loans.

5 THE COURT: But I guess --

6 MR. TOP: And so my other point on this is that --

7 THE COURT: And so what you're saying I did was  
8 approve a protocol that applied to fewer than half of the  
9 loan files?

10 MR. TOP: Well, that's one way of looking at it.  
11 The other way of looking at it, this is probably the largest  
12 piece of the claims the RMBS trustees are going to have that  
13 relate to covered loans, as opposed to transferor loans,  
14 because of the differences with the representations and  
15 warranties with respect to them.

16 THE COURT: Right.

17 MR. TOP: Right? So there's like 50 or 60 reps  
18 and warranties with respect to covered loans that they're  
19 responsible for, and maybe four or five that they continue  
20 to be responsible for, transferor loans. So again, the  
21 focus was -- and my view was to try to sit down and resolve  
22 these claims, and of course this is the obvious way to  
23 start. Let's take a look at the covered loans, let's  
24 generate the claim, a large percentage of the claim. And so  
25 the milestones (indiscernible) really relate to the 209,000.

1 We have to do 50,000 by July 1, and thereafter we had to do  
2 17,000 per month. And you total all those numbers up, and  
3 it comes up to something over 200,000.

4 THE COURT: I need to have an understanding of the  
5 number of loans that are covered loans that are seeking to  
6 be expunged, and the number of loans that are transferor  
7 loans. This is still very unclear to me

8 MR. TOP: Okay, so we can do the covered loans  
9 backwards. We've submitted so far a little over 92,000  
10 claims under the protocol for covered loans. We also  
11 submitted the letter that includes about 12,000, so that  
12 would bring the total of that up to about 104, if my math is  
13 correct. We ended up reviewing probably approximately  
14 220,000 loans, because we found some other loans that looked  
15 like they were covered loans, so we included them in the  
16 process. So we're probably talking about 130,000 covered  
17 loans that would be expunged, and then at least -- I don't  
18 have an exact number, I'm sorry, for transferor loans, but I  
19 want to say half a million.

20 THE COURT: Okay, but hold on, Mr. Cosenza, let me  
21 finish my thought. So if transferor loans weren't covered,  
22 then why were transferor loans submitted?

23 MR. TOP: Transferor loans were not submitted. We  
24 didn't submit any transferor loans.

25 THE COURT: I'm sorry, I thought you just said --

1 MR. TOP: No, I did. I apologize. We submitted  
2 92,000 covered loans, plus the letter, 12,000 covered loans,  
3 104,000 covered loans. So the 2000 (indiscernible).

4 THE COURT: So how do you get the 210?

5 MR. TOP: 220?

6 THE COURT: Yeah.

7 MR. TOP: That's the total number of covered  
8 loans.

9 THE COURT: Okay, and that's just where we are in  
10 the protocol now?

11 MR. TOP: That's correct. So we're coming into  
12 Step 3, and --

13 MR. COSENZA: I don't mean to interrupt, Your  
14 Honor, just the numbers, they're referenced in Footnote 6 of  
15 the trustee's motion. The transferor loans, according to  
16 the trustee, means that the RMBS trust that are not covered  
17 loans. Transfer of trust, meaning 150 out of 405 RMBS  
18 trusts that are not covered trusts. There are approximately  
19 600,000 transferor loans in the RMBS trust. And this is in  
20 their objection.

21 THE COURT: Footnote 6?

22 MR. COSENZA: This is Footnote 6, Page 3 of their  
23 objection to our motion.

24 THE COURT: Footnote 6, Page 3.

25 MR. COSENZA: Of their objection, that was filed

1 right before Memorial Day. May 26th.

2 THE COURT: Okay. So how many -- so you're  
3 seeking to avoid disallowance of all of the transferor  
4 loans? No transferor loans have been submitted to the  
5 protocol?

6 MR. TOP: That's right.

7 THE COURT: And when it came time to do the  
8 extension order, and the clear language said everything else  
9 is expunged --

10 MR. TOP: Covered loans, or otherwise, that are  
11 subject to the protocol. I mean, the purpose of bargaining  
12 and extension is not to seek to change the protocol in any  
13 way. We just had a handful of loans (indiscernible) review.

14 THE COURT: But how is -- you went to the Lehman  
15 and said, "We're running out of time, give us an extension."  
16 And they said, "Okay, tell us what you need an extension  
17 for," and they did." And they said, "Okay, we'll give you  
18 the extension, and everything else gets expunged. So that's  
19 where the ships passed in the night, you're telling me.

20 MR. TOP: Yes.

21 THE COURT: But the language of the order says  
22 covered loans or otherwise. What was the point of saying  
23 "or otherwise" -- if you say that the protocol only relates  
24 to covered loans, and you were only seeking an extension  
25 relating to loans covered by the protocol, then why would

1 the extension order have to include the words "or  
2 otherwise"? Because if we're all only talking about covered  
3 loans, you wouldn't have had to have the words "or  
4 otherwise."

5 MR. TOP: Well, which may be why -- again, we  
6 weren't trying to change the protocol, or do anything like  
7 that. I think that's what I told Your Honor when I did this  
8 in March. Or otherwise doesn't mean anything to me, if  
9 (indiscernible) looking in terms of covered loans.

10 THE COURT: But lawyers are lawyers, right? So if  
11 there is no otherwise, and everything is covered loan,  
12 there's no need to use the terminology "or otherwise". I  
13 need to ask Mr. Cosenza a question, okay?

14 MR. TOP: Sure, sure.

15 THE COURT: So I'm interested in the math of the  
16 protocol. If Mr. Top is incorrect, why do the number of  
17 files only add up to the number of covered loans?

18 MR. TOP: Your Honor, just to give you background  
19 behind the protocol --

20 THE COURT: Do you know what I mean?

21 MR. TOP: You have to (indiscernible) how we got  
22 there. When they moved to increase the reserve to that  
23 astronomical number we had the hearing on, they didn't  
24 ascribe any value to the transferor loans. That was not  
25 even part of their inflated \$12 billion to \$13 billion

1 number. So they didn't even include that as part of it. So  
2 in terms of us calculating, and sitting down with the  
3 trustees as to the loans that were sort of at issue, there  
4 was an acknowledgement -- there have been several  
5 acknowledgements during this whole process, of the protocol  
6 that they were not pursuing the transferor loans. There were  
7 acknowledges to us, there were acknowledgements to Your  
8 Honor during this process.

9 And I do want to -- I want to go back and forth,  
10 but I did want to touch one point on the extension order.  
11 There was a debate I had with Ms. Bolan, who represents U.S.  
12 Bank in the (indiscernible) litigation about the transferor  
13 loan being covered, and U.S. Bank's claim being covered  
14 within the protocol. And there was a long debate about  
15 that, and Ms. Bolan took the position that the U.S. Bank  
16 trust, even though it's a transferor trust, should not be  
17 covered by the protocol, should be different, and basically  
18 we said, "No, we just were (indiscernible) notice that you  
19 should put those loans through, and they never put those  
20 loans through."

21 And it's telling that in the extension order,  
22 because this was an issue on that one transferor trust, we  
23 added a paragraph, based on the request of the trustees,  
24 when we went back and forth, to the extension order. And it  
25 wasn't going to give anyone rights, but it basically said,



1 this order is laid out on Page 2, this order is without  
2 prejudice to the rights of the parties in the Green Point  
3 adversary proceeding, including any right to seek or contest  
4 the application of the protocol order, and/or protocol to  
5 the loans which are subject to the Green Point adversary.  
6 So that was a carve out, because that was a dispute with  
7 that one particular trust, that was a transfer of trust, and  
8 whether or not that should be put through the protocol. But  
9 we're just seeking today, if that really was the issue, and  
10 they were intending to put -- transfer of trust weren't  
11 covered by the protocol -- there would be no reason to have  
12 this one sort of reservation of both side's arguments on the  
13 Green Point Trust, because that's a transfer of trusts. So  
14 that's one point.

15 Your Honor, the other point about the Aurora  
16 loans. Aurora only has covered loans. It doesn't have a  
17 transfer of loans, and that is why there was that definition  
18 of transfer of loans. The loan files for the transfer of  
19 trust are with the servicers, that they sought information  
20 from the B of As, the (indiscernible). All the transferor  
21 loans are with those servicers. They could very easily have  
22 gained access through the protocol, or flagged that as an  
23 issue during the process. They realized, as they had done  
24 when they filed their initial motion increase the reserve,  
25 that the transferor loans weren't really worth pursuing,

1 they're of little or no value. That makes sense, from our  
2 perspective.

3 To have 16 months go along, agree to the  
4 expungement motion, not to come with us for an extension on  
5 any issues, make various representations to us throughout  
6 the entire process, to us, to the Court that they're not  
7 pursuing them, and now to come forward with this objection  
8 to our motion, which is simply an administrative motion, is  
9 a little bit astounding, frankly, from our perspective.  
10 This is something, that really, if there was some confusion,  
11 it could have been corrected really early in the protocol,  
12 and frankly, the representations that they made to us and to  
13 the Court during this process, they are now being directly  
14 contradicted by the counsel, for the trustees.

15 So this is -- I really don't know what to make of  
16 why we're here today. That order was simply an  
17 administrative order to simply clean up the claims registry,  
18 because we're told by our client that the claims registry is  
19 massive in this case, and simply way or sort of cleaning it  
20 up. And now that we're at this position, in response to  
21 that motion I would have thought we would have been here, if  
22 this really was an issue, back in January, when we talked  
23 about this with Your Honor with various counsel present,  
24 where there was a representation made that they weren't  
25 pursuing the transfer loans. I thought maybe they'd

1 reconsider that in March when they sought the extension,  
2 they would have raised this issue with us. Instead, we gave  
3 them the extension, because frankly, for the number of loans  
4 that were left, there were obviously always administrative  
5 issues. Given the extra two months, makes total sense. But  
6 not to raise this as an issue, but then to raise it after  
7 they get the extension is really -- we're sort of shocked by  
8 why we're here today.

9 Your Honor, just one last point, because there  
10 seems to be all sorts of definitional -- it was clear that  
11 the protocol motion, our cross-motion, was the motion that  
12 was granted by the Court. The definitions in there were  
13 intended -- and we had the hearing, it was intended to cover  
14 everything, that was everyone's intention. We included a  
15 footnote in the protocol order, to make sure there was  
16 little confusion about this, that it was intended to cover  
17 all the loans. It incorporates our definition. We agree  
18 with Your Honor's views as described therein, was really  
19 just described the claims process, not to modify prior  
20 definitions, and not to somehow limit the universe of loans.  
21 So we think for all those reasons, Your Honor, we think our  
22 motion should be granted, and all these claims should be  
23 expunged. Thank you.

24 THE COURT: All right, if you would give me about  
25 five minutes or so, and then I'm going to come back and let

1 you know what I'd like to do, all right?

2 (Recess)

3 THE COURT: Okay. Thank you very much. I  
4 appreciate your answering all the questions I had coming  
5 into this. I think, as I indicated to Mr. Top, once the  
6 clarification was made, with respect to which loans we're  
7 talking about, the two buckets being covered loans and  
8 transferor loans. I think what I said to Mr. Top, with  
9 respect to the operation of the reservation of rights to use  
10 sampling or alternate means, is in fact my ruling. As it  
11 emerged, there's no dispute that the loans that were the  
12 subject of the letter as to which the trustee's asserted  
13 their reservation of rights to seek to prove them up by  
14 alternate means, that's not how the protocol operates, but  
15 by its terms. That in effect, would operate as an opt-out  
16 provision, and that's just not the way the protocol words.  
17 So as to that, that argument is rejected.

18 As to the transferor loans, the argument as to  
19 that centered around the use of the term covered loans in  
20 various portions of the protocol, but given the history and  
21 the genesis of the protocol, which began with the estimation  
22 motion, was responded to with the cross-motion, which fully  
23 embraced all of the loans, to use the terminology that was  
24 used initially, the covered loans and the transferor loans.  
25 Notwithstanding the fact that the number of loan fields,

1 when you add them up under the protocols, the protocols  
2 contemplated the progression towards the finish line, it  
3 adds up to roughly the number of covered loans. My ruling  
4 is that the protocol, in fact, covered everything, and that  
5 to the extent that -- and the numbers are not inconsistent  
6 with that, because as the way this has developed, it has  
7 certainly been -- has certainly seemed clear that the  
8 transferor loans were not viewed as having much, if any,  
9 value, and therefore it's appropriate that the march toward  
10 the finish line, and submitting all these loan files,  
11 properly focused on loans that were not transferor loans.

12 Moreover, the facts and circumstances, and the  
13 language of the extension order, created another occasion  
14 and reinforce my view that these claims should be expunged.  
15 The inclusion of the words, or otherwise, in addition, the  
16 language that Mr. Cosenza pointed out with respect to that  
17 subset of loans just add up to a picture in which it's clear  
18 to me that this process was intended to, and did, and  
19 everybody was operating under the impression that it related  
20 to all the loans. So for all those reasons, and including,  
21 with respect to the reduction of the reserves, I'm going to  
22 enter an order granting Lehman's motion.

23 All right? All right, will you share an order  
24 with each other and send it to us, once you have everyone's  
25 sign-off? Thank you very much, and let me also say that I

1 know that there was a lot of back and forth on the  
2 scheduling of this, and I very much appreciate your  
3 flexibility. I'm about to start three weeks of trial,  
4 travel, trial, travel, and I just, I wanted to see you  
5 sooner rather than later. So I appreciate that some of your  
6 colleagues aren't here today, and I appreciate that you were  
7 still willing to come in. All right? Okay, thank you.  
8 Thank you.

9 (Whereupon these proceedings were concluded at  
10 3:04 PM)

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing  
transcript is a true and accurate record of the proceedings.

Sonya Ledanski  
Hyde

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Date: June 13, 2016